No. 83-225

In The
# Supreme Court of the United States
October Term, 1983

LARRY VAN EMMERIK, for Himself, and
All Others Similarly Situated,
*Petitioner,*

vs.

MONTANA DAKOTA UTILITIES CO.,
a corporation, et al.,
*Respondents,*

and

LARRY VAN EMMERIK, for Himself and
All Others Similarly Situated,
*Petitioner,*

vs.

BLACK HILLS POWER AND LIGHT COMPANY, et al.,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF SOUTH DAKOTA

BRENT A. WILBUR
MAY, ADAM, GERDES & THOMPSON
503 South Pierre Street
Pierre, South Dakota 57501
(605) 224-8803

ROBERT B. FRIEBERG
Box 511
Beresford, South Dakota 57004
(605) 763-2107

LEO P. FLYNN
Box 505
Milbank, South Dakota 57252
(605) 432-6611

*Attorneys for Respondents*

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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## STATEMENT OF THE CASE

For purposes of clarity the format of petitioner's Statement of the Case will be followed in this brief.

### I. Sales Tax Legislation

The 1980 South Dakota Legislature passed Senate Bill 40, a bill which enacted a retroactive tax of 5% on the gross receipts received from the sale of utilities within the State of South Dakota. That statute was challenged by petitioners in an action described as Van Emmerik III,

in petitioner's brief. The statute was upheld by the South Dakota Supreme Court. *Van Emmerik v. Janklow, et al.*, 304 N. W. 2d 700 (SD 1981). This court declined to hear an appeal concerning the merits of that legislation. 454 U. S. 1131, 71 L. Ed. 2d 285, 102 S. Ct. 986.

**II. Excess Tax Collections**

The passage of Senate Bill 40 by the 1981 South Dakota Legislature and its subsequent approval by the judicial system established the sales tax rate on South Dakota utilities for the period in question in this litigation at 4% for the period through July 1, 1980 and 5% thereafter. Those rates resulted in revenue to the state in an amount that equalled those taxes actually received from the consumer by the utilities, therefore effectively negating any claim that tax collections made during the pertinent time period were excessive.

**III. Van Emmerik and Related Litigation**

**(A) Van Emmerik I**

The first of plaintiff's several lawsuits was initiated in March, 1979, naming as defendants several South Dakota State officials and a class of utility suppliers, none of whom were named or served at the time. The complaint alleged a cause of action for overpayment of sales taxes. (A complete copy of plaintiff's complaint is reproduced in Appendix A.) Plaintiffs did not seek to amend their complaint to allege a violation of 42 USC § 1983 or to claim attorneys' fees under 42 USC § 1988. Plaintiffs did amend their complaint to include 2 of their 106 suppliers of utilities within the State of South Dakota as defendants. After the trial court denied plaintiff's

claims, the South Dakota Supreme Court ruled against petitioners, denying Van Emmerik's claims for damages against the State of South Dakota, on the grounds of sovereign immunity and a lack of standing. The court recognized but did not resolve various issues relating to plaintiff's failure to exhaust all remedies. However, the court held that, because of the derivative nature of plaintiff's claim, plaintiff could not recover any amounts in excess of the amounts which could be received by the various utilities involved in the litigation. 298 N. W. 2d at 807.

On remand, the case was resolved by summary judgment in favor of defendants. Significantly, on remand plaintiffs did not seek to amend Van Emmerik I to seek relief and attorneys' fees under 42 USC § 1983 and § 1988. The trial court's summary judgment was affirmed on appeal. *Van Emmerik v. Montana Dakota Utilities Co., et al.*, 332 N. W. 2d 279 (SD 1983). Throughout Van Emmerik I none of the other 104 suppliers of utility service within the State of South Dakota were ever made parties to the litigation.

**(B) The Utilities' Tax Refund Case**

Six investor owned utilities doing business in South Dakota filed a refund claim in June of 1979, several months before any utilities were named as defendants in Van Emmerik I. The claim filed by those utilities demanded a refund for tax overpayments for the proceeding three years. Ultimately, the South Dakota Supreme Court ruled in favor of the utility companies and remanded the action to the Circuit Court for determination of the size of the refund. In the *Matter of the Sales Tax Refund Applications*, 298 N. W. 2d 799 (SD 1980).

The effect of this action was later rendered moot by Senate Bill 40, as mentioned above, which retroactively validated all taxes already paid to the State of South Dakota.

**(C) Van Emmerik II**

Van Emmerik II was commenced after the refund case had been brought by the utility companies. Although premised on the same factual basis as Van Emmerik I, this second action named numerous individual utilities as defendants and excluded the State of South Dakota and its officials who had been named in Van Emmerik. For the first time, municipally owned electric utilities and rural electric cooperatives were included with the investor owned utilities as defendants. The case lay dormant until January, 1981, two months after a favorable ruling in the *Matter of Sales Tax Refund Applications,* supra. At that time, Van Emmerik amended his complaint to claim a violation of 42 USC § 1983. The case was ultimately dismissed on summary judgment; at no point in the litigation was relief of any sort granted. The enactment of Senate Bill 40, and the decisions in the refund case referred to above disposed of the dispute concerning the proper rate of sales tax. It should be noted that the South Dakota Supreme Court failed to attach any significance to Van Emmerik II in its decision denying attorneys' fees in the present.

**(D) Van Emmerik III**

The case of *Van Emmerik v. Janklow, et al.*, 304 N. W. 2d 700 (SD 1981) was brought by petitioners seeking a judgment declaring that Senate Bill 40, as passed by the

1980 South Dakota Legislature was unlawful. As noted above, the South Dakota Supreme Court disposed of Van Emmerik's claim by determining that the retroactive sales tax legislation contained in Senate Bill 40 was constitutional. With that finding, any fund that may have been available for refund to the utilities under the procedures cited by the South Dakota Supreme Court in the utility refund case, 298 N. W. 2d 799, 803 was extinguished. The only conceivable saving that thus may have been realized was the reduction in sales tax rates for the period from December, 1980, through May, 1981. That saving would have accrued to individual consumers and would have resulted in "no benefit accruing to the utilities as a result of (Van Emmerik's) lawsuit." 332 N. W. 2d at 238. Although taxpayers were subject to a lower rate of taxation for a short period of time, the amounts of any saving have never been determined.

**IV. Reasons for Denial of Writ**

Plaintiff seeks to claim attorneys' fees for all of the Van Emmerik cases referred to above pursuant to 42 USC § 1988. As noted before, the only action which can be claimed to have had any impact whatsoever on the plaintiff class, Van Emmerik I, did not make any claim for relief pursuant to 42 USC § 1983 and did not allege any constitutional violation; instead, that case appears to have been intended merely as a derivative action for a sales tax refund. The mere fact that plaintiffs sought to promote a theory which they perceived to be in the public interest did not automatically allow a grant of attorneys fees. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U. S. 240, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975).

Plaintiff's reliance on *LaRaza Unide of Southern Alameda County v. Volpe,* 440 F. Supp. 94, is misplaced. In that action plaintiffs alleged a violation of the Relocation Assistance Act, a federal statute. The District Court merely held that this court's ruling in *Alyeska,* supra, was not applicable to an action alleging a violation of a specific federal act as well as violations of due process and equal protection. Because Van Emmerik I never raised any claim that a refund should be granted because of the "deprivation of any rights, privileges, or immunities secured by the constitution and laws" as provided by 42 USC § 1983, the *LaRaza Unide* decision would be inapplicable. As can be seen from a reading of the complaint in Van Emmerik I (attached in the appendix hereto), that action was litigated solely to seek a construction of a state sales tax statute and never rose to the level of 42 USC § 1983.

Similarly, plaintiff relies upon *Gumbhir v. Kansas State Board of Pharmacy,* 646 P. 2d 1078 (K. 1982) to establish that plaintiff need not have specifically and properly pleaded a § 1983 violation. In that case, plaintiff had a violation of various rights guaranteed by the United States Constitution. The Kansas Supreme Court held that because certain constitutional violations had been plead, 42 USC § 1983 did not need to be specifically plead to trigger a possible recovery of attorneys fees under 42 USC § 1988. *Gumbhir* is distinguishable because the plaintiff in that case at least alleged several constitutional violations.

Had plaintiff here originally claimed a violation of 42 USC § 1983, he might conceivably have made a claim that would have triggered an award of attorneys fees un-

der 42 USC § 1988. However, plaintiff can point no theory of law which would authorize a grant of attorneys fees in a state tax refund action which raised no question of federal law. If plaintiffs generally were allowed to proceed as Van Emmerik wants to do here, any plaintiff could commence an action and, after conclusion of that action, claim that his cause of action actually arose under 42 USC § 1983 and then seek attorneys fees.

Van Emmerik must show that he has somehow prevailed in Van Emmerik II in order to make a valid claim for attorneys fees, which he has utterly failed to do. Van Emmerik II was not amended to allege a violation of 42 USC § 1983 until two months after the current defendants had prevailed in their refund litigation. In the *Matter of the Sales Tax Applications*, supra. A summary of the proceedings in Van Emmerik II shows the following progression. The complaint was filed in February 1980; the complaint was amended to allege a violation of 42 USC § 1983, in January, 1981; summary judgment was granted in favor of defendants on all issues in September of 1981; plaintiff appealed on the merits; the appeal was rejected by the South Dakota Supreme Court. Plaintiff chose not to petition this court for certiorari on the merits, but instead appealed only the question of attorneys' fees, thus cutting adrift any possible chance for prevailing on the merits. It is difficult to equate that progression with the proposition that plaintiff somehow prevailed on any theory in the Van Emmerik II litigation and is, therefore, entitled to an award of attorneys fees.

Further, neither the State of South Dakota nor any state officials were named as defendants in the Van Em-

merik II litigation. At the time that litigation was brought, the state was imposing a tax on utilities at a rate which was determined to be unlawful. The higher, and incorrect, rate was passed through to consumers (Petition for Writ of Certiorari, p. 18). As noted in the complaint and in numerous arguments before various courts, the utility companies were only a conduit collecting a tax from their consumers and paying those tax collections to the state treasury. Because neither the state nor any state officials were named as parties in Van Emmerik II, petitioner has turned to the admittedly innocent utilities to reward the attorneys for their efforts. None of the cases cited on pages 19 and 20 of the petition for certiorari support such a novel theory. To the contrary, each decision cited by petitioner is clear in holding that attorneys' fees are awarded because, in some way, a constitutionally guaranteed right was assured by a plaintiff's willingness to "take on the system." In none of those cases could the defendants against whom attorneys fees were sought have been characterized as innocent conduits. Van Emmerik now seeks to make a claim against the utilities because he failed to properly include defendants who could be shown to have benefited from a change in the sales tax rates.

The Van Emmerik cases have failed to make any impact upon the plaintiff, the class he purports to represent, or the State of South Dakota. The possible benefit received from the plaintiff's class should instead be attributed to the case of in the *Matter of the Sales Tax Refund Applications*, supra, which decision actually lowered the sales tax rates in question for a short period of time. It would be incongruous to hold that the utility companies who properly acted to claim a refund, only to see that re-

fund erased by later legislation, should now be required to pay Van Emmerik's attorneys fees. Instead, Van Emmerik ought to look either to the plaintiff class or the State of South Dakota for payment of his attorneys fees.

## V. Conclusion

For the reasons mentioned above, the Petition for Writ of Certiorari should be denied.

Dated this 19th day of September, 1983.

Respectfully submitted,

MAY, ADAM, GERDES & THOMPSON
By: /s/ BRENT A. WILBUR
*Attorneys for Respondents*

503 South Pierre Street
P. O. Box 160
Pierre, South Dakota 57501
(605) 224-8803

ROBERT B. FRIEBERG
Box 511
Beresford, South Dakota 57004
(605) 763-2107

LEO P. FLYNN
Box 505
Milbank, South Dakota 57252
(605) 432-6611

## APPENDIX



IN CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT

*State of South Dakota, County of Hughes, ss*

LARRY VAN EMMERIK, for himself and for all others similarly situated,

*Plaintiff,*

vs.

THE STATE OF SOUTH DAKOTA, DAVID VOLK, State Treasurer of South Dakota; STEVEN J. ZELLMAN, Secretary of Revenue of the State of South Dakota:

and

A class consisting of all individuals, partnerships, associations, or corporations who or which have, since January 1, 1976, engaged in the sales, furnishing or service of gas, electricity or water to consumers or users in the State of South Dakota,

*Defendants.*

# COMPLAINT

## I.

## THE PLAINTIFF AND THE CLASS OF PLAINTIFFS

1.01 Plaintiff is a resident of South Dakota. During the three years last past he has paid, as part of his "utility" bills for gas and electricity, an added item of four percent (4%) of the total bill, represented to be the South Dakota state sales tax thereon.

1.02 The class of plaintiffs whom the named plaintiff seeks to represent consists of all residents of South Dakota who have, since January 1, 1976, paid as an added item on their utility bills for gas and electricity, four percent (4%) of the total, represented to be the South Dakota sales tax thereon.

## II.

## THE DEFENDANTS—STATE OF SOUTH DAKOTA

2.01 The State of South Dakota has consented to be sued by SDCL 10-45-53.

2.02 The defendant Volk, State Treasurer, is joined because funds derived from sales tax are paid over to him.

2.03 The defendant Zellman is joined because he is charged by law (SDCL 10-45-53) with responsibility for making refund of sales tax paid when not due. This Complaint constitutes a claim for refund, on behalf of the plaintiff and all members of the plaintiff class, of the difference between four percent and three percent (4% and 3%) of their utility bills paid since January 1, 1976.

## III.

## THE DEFENDANT—UTILITY COMPANIES

3.01 All utility companies engaged in the sales, furnishing or service of gas, electricity or water to consumers in South Dakota are joined as a class as defendants.

3.02 Said utility companies are not under statutory or other obligation to claim any tax refunds for the benefit of the plaintiff class, and have no financial interest in doing so. Accordingly, they are joined as defendants.

3.03 No monetary judgment is sought against the utility companies.

## IV.

## THE SALES TAX CONTROVERSY

4.01 Prior to 1969, a sales tax of three percent (3%) was levied on sales of tangible personal property (SDCL 10-45-2). A separately stated tax of three percent (3%) was levied on gross receipts from furnishing gas, electricity or water (SDCL 10-45-6).

4.02 By Chapter 267, Laws of 1969, SDCL 10-45-2 was amended so as to increase the sales tax on tangible personal property to four percent (4%). No such amendment was made with respect to the rate on utility bills, SDCL 10-45-6. Copy of Chapter 267, Laws of 1969, is attached marked Exhibit "A".

4.03 By Chapter 97, Laws of 1974, SDCL 10-45-6 was amended in other respects, but the three percent (3%) rate was not only left undisturbed, but was affirmatively re-enacted. Copy of Chapter 97, Laws of 1974, is attached marked Exhibit "B".

## V.

## MISINTERPRETATION OF THE LAWS

5.01 The Attorney General of South Dakota, in 1969, mistakenly concluded that Chapter 267, Laws of 1969, served to increase the sales tax on utility bills from three percent to four percent (3% to 4%). See Exhibit "C" attached hereto.

5.02 Pursuant to this mistaken interpretation, the officials of South Dakota have continued to demand and collect a four percent (4%) sales tax from all utility companies operating in the state.

5.03 Such utility companies, having no financial stake in the matter, have charged the four percent (4%) rate to their customers, all of whom are members of the plaintiff class, and the utilities have remitted the same to the state, as required by SDCL 10-45-22.

5.04 Since 1976, plaintiff is informed and believes that the state has collected in excess of $21,000,000.00 in sales taxes from the defendant utilities, of which over $5,254,000.00 has been collected without authority in law, and by mistake.

5.05 This erroneous and unlawful collection of four percent (4%) instead of three percent (3%) on utility bills will continue unless restrained by decree of this court.

## VI.

## NECESSITY FOR CLASS ACTION

6.01 The persons constituting the plaintiff class number many thousands so as to make it impracticable to bring them all before the Court.

6.02 The character of the right sought to be enforced for the plaintiff class is secondary in the sense that the primary right belongs to the utility companies, who have no financial interest in enforcing same.

6.03 There is a common question of law affecting the several rights of the plaintiff class and a common relief is sought.

6.04 It would require a suit by each member of plaintiff class to compel the defendant utility companies to file a claim for refund under 10-45-53. This would result in a multiplicity of actions.

6.05 The amount due each member of plaintiff class is relatively small and when compared with costs of suit, would discourage individual legal action. Unless this class action is permitted, the state defendants would be unjustly enriched at the expense of the plaintiff class.

## VII.

## INJUNCTION

7.01 Unless restrained, defendant state and its officers will continue to demand collection and payment of the four percent (4%) tax.

7.02 Unless protected by Order of Court, the defendant utility companies will continue to collect and remit the four percent (4%) tax.

7.03 Individual plaintiff is without adequate remedy at law because costs of suit are disproportionate to individual recoveries.

## IMPLIED TRUST

8.01 The state defendants, as a direct and proximate result of the illegal or mistaken collections of four percent (4%) sales tax instead of three percent (3%) sales tax, has gained in excess of $5,250,00.00 (sic) from the plaintiff and other taxpayers of this state who are similarly situated, which money rightfully belongs to the said plaintiff class and said class of taxpayers have a legal and better right to said funds than the defendants, as a result of which, this Court should impose an Implied Trust upon said fund for the benefit of the plaintiff class of taxpayers, which implied trust is authorized by the provisions of SDCL 55-1-8.

## IX.

## REFUND OR CREDIT

9.01 Although individual refunds to each member of the plaintiff class would necessitate tremendous expenditures of time, effort and money, the defendant utilities have all of the records, equipment or facilities to make a reasonable determination as to the amount to which members of the plaintiff class are entitled by way of refund.

9.02 Substantial justice could also be accomplished by ordering a credit to be given each utility customer against taxes due or to become due in the future, which remedy is authorized by provisions of SDCL 10-45-53.

## X.

## ATTORNEY FEES AND EXPENSES

10.01 If this suit is successful, counsel for plaintiff class will have been instrumental in creating a fund of several millions of dollars for the benefit of plaintiff class.

10.02 The fund so created should be caused to pay:

(a) Reasonable fees and expenses of plaintiff's counsel.

(b) Reasonable expense of the defendant utility companies in furnishing information to the Court and in carrying out the refund decree.

## XI.

WHEREFORE, Plaintiff prays for judgment as follows:

11.01 That the lawful rate of taxation of gross receipts from sales, furnishing or service of gas, electricity or water under SDCL 10-45-6 be decreed to be three percent (3%) and no more.

11.02 That the state defendant and defendant utility companies be enjoined and restrained from imposing, exacting or collecting from consumers any state sales tax in excess of three percent (3%), for a period of time until the relief decreed herein is accomplished.

11.03 That an appropriate decree be entered directing the refunds of excess sales tax mistakenly collected during the past three years to customers of the defendant utilities companies, either by means of credit on current or future bills, or by direct refund to members of the plaintiff class of those sums illegally paid by said taxpayers.

11.04 That the Court recognize the public interest and significant public benefits conferred upon the plaintiff class, and make an appropriate allowance for fees

and expenses of plaintiff counsel and for expenses of the defendant utilities companies in connection herewith.

Dated this 15th day of March, 1979.

MAY, JOHNSON, DOYLE, BECKER & FISHER, P.C.

By: /s/ GALE E. FISHER
412 West Ninth Street
P. O. Box 1443
Sioux Falls, South Dakota 57104

BANGS, MCCULLEN, BUTLER, FOYE & SIMMONS

By: /s/ GEORGE A. BANGS
818 St. Joe Street
P. O. Box 2670
Rapid City, South Dakota 57709